

GEORGIA INSTITUTE of TECHNOLOGY
APPEAL of
INFRACTIONS REPORT No. 345

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APPEAL OF THE GEORGIA INSTITUTE OF TECHNOLOGY

I. Introduction.

The Georgia Institute of Technology (“Georgia Tech” or “Institute”) admits, and regrets, that it made mistakes in the handling of the investigation in this case, but does not believe that its conduct warrants the severe findings and penalties imposed by the Committee on Infractions (“Committee”). Georgia Tech has a steadfast commitment to the integrity of its athletics program, including full cooperation with and support of the NCAA. Georgia Tech fully supports the NCAA’s core values which also include maintaining the highest levels of integrity and sportsmanship while pursuing excellence in both academics and athletics. Georgia Tech takes its compliance obligations very seriously, and accepts responsibility for its mistakes. These mistakes, however, were made in good faith while Georgia Tech took what it believed to be reasonable and appropriate steps under the circumstances. Georgia Tech acted at all times with a commitment to uphold both the spirit and the letter of the NCAA Bylaws.

Georgia Tech appeals the finding of Failure to Meet the Conditions and Obligations of Membership (Finding B-3) for not withholding Student-Athlete 1 from competition. Georgia Tech also appeals the sanction that it must vacate the one victory while Student-Athlete 1 competed while ineligible. The Committee abused its discretion in imposing this sanction. A review of relevant factors identified by the Committee and the Infractions Appeals Committee (“Appeals Committee”) does not support the vacation penalty, nor does imposition of this sanction in this case support the purpose of the vacation rule. Finally, Georgia Tech appeals the finding of Failure to Cooperate (Finding B-2), though the Committee stated this finding did not in any way serve as the basis for the vacation penalty.

Although not a specific basis for this appeal, Georgia Tech also takes exception and objects to the overall message of the Committee’s Report. The Committee’s message is that

Georgia Tech was more concerned with allowing one player to compete than it was to finding the truth regarding his eligibility,¹ and, as a result, intentionally ignored the NCAA's directives. This message has caused significant damage to Georgia Tech, and the strong negative aspersions in the Committee's Report against both the institution as a whole and the individuals involved are not warranted.

The Committee's Report unfairly creates the impression that Georgia Tech's senior leadership intentionally attempted to obstruct and circumvent the NCAA's investigative process. President Peterson has stated publicly that at no time before, during, or after the sixteen-month investigation did anyone from Georgia Tech take any action with the deliberate intent to either hinder or impede the investigation. Georgia Tech has acknowledged mistakes, but these mistakes resulted from lack of familiarity with the NCAA investigative process or other reasonable factors, and not from a desire to obstruct the NCAA's process.

The Committee's Report contains several unwarranted statements directed toward the Institute. For example, the Committee's statement that "the institution attempted to manipulate the information surrounding potential violations involving student-athlete 1 so there would be enough doubt about its validity to justify the decision not to declare him ineligible" is speculative and incorrect. The Committee also stated that it appeared the Institute's former general counsel adopted an obstructionist approach to the investigation, and other persons at the institution conveyed a combative and confrontational attitude during the process. Most troubling is the Committee's unfounded statement that the Institute took actions deliberately intended to inhibit and obstruct the investigative process. These inaccurate statements clearly call into question the

¹ Although there were two student-athletes at issue in the Notice of Allegations and the hearing, the Committee on Infractions ultimately made findings as to only one student-athlete's eligibility.

ethics of the Institute as a whole, and, even if the Institute agreed with all of the specific findings of violations and sanctions imposed, it still would have appealed the Committee's decision solely to set the record straight on these damaging statements. The Committee's comments go farther than this, however, as they impugn the good names and reputations of specific individuals who, while admittedly not perfect, did not act with ill intent and motives as the Committee found. The Committee's speculation that these individuals did not merely make mistakes but instead acted intentionally and in an organized manner with disregard for NCAA bylaws is the most troubling aspect of the Report, particularly in light of the following actions and comments of the Enforcement Staff to the contrary.

During the hearing, in response to a question from the Committee, the Enforcement Staff rejected the notion that Georgia Tech staff members were part of a conspiracy to obstruct the investigation. The Enforcement Staff specifically stated that it did not reach this conclusion, as is discussed in greater detail in Section V below, and added that had evidence of such a conspiracy existed, it would have charged the individuals with unethical conduct.

In addition, at no time during the investigation did the Enforcement Staff attempt to contact, request a meeting, or communicate in any other way with President Peterson to express concern regarding the perceived attitudes and approaches of various Georgia Tech staff members. As clearly indicated in the NCAA Bylaws, the President is ultimately responsible for the conduct of the institutional representatives. Had President Peterson been given an opportunity to hear the concerns of the NCAA staff, he would have addressed any problems or misunderstandings immediately to ensure that the NCAA was fully satisfied with adherence to principles and a spirit of cooperation at all levels of the Institute. This point is particularly relevant given that only a few months prior to this investigation, several members of the

Enforcement Staff requested a meeting and actually met with President Peterson regarding a matter involving a different sport.

At Georgia Tech, maintaining and protecting institutional integrity is preeminent, and that includes full cooperation with the NCAA. President Peterson takes very seriously the responsibilities of the cooperative principle as outlined in the letter accompanying the Notice of Allegations. Given President Peterson's past record of compliance and interactions with the NCAA, had he been apprised of the concerns of the NCAA staff, he would have addressed any problems or misunderstandings and corrected these immediately, rather than face the possibility of damning language and findings that brand Georgia Tech as an institution that failed to cooperate and failed to meet the conditions and obligations of membership.

II. Nature of the Violations and Findings on Appeal.

The underlying violation involves the provision of approximately \$312 in clothing to Student-Athlete 1. Indeed, the Committee noted that, regarding the football program, this case initially involved an isolated instance of impermissible benefits and preferential treatment. COI Report, p. 1. Student-Athlete 1 received the clothing, but there was a dispute as to who provided the clothing – either Student-Athlete 1's cousin or his cousin's roommate ("the roommate"). Following a sixteen-month investigation, the Committee looked at conflicting evidence and determined that the roommate, and not Student-Athlete 1's cousin, provided the clothing. The Committee found that the benefits constituted preferential treatment in violation Bylaw 12.1.2.1.6. As outlined in its response to the Notice of Allegations and as presented at the

hearing, Georgia Tech believed that the clothes came from Student-Athlete 1's cousin. Georgia Tech accepts the Committee's conclusion to the contrary and does not appeal Finding B-1.²

What is at issue in this appeal is the Committee's finding that Georgia Tech's handling of the investigation of the clothes constituted two separate major violations. The Committee found that Georgia Tech had failed to meet the conditions and obligations of membership, Finding B-3, when it did not withhold Student-Athlete 1 from competition after being made aware of information that raised questions about his eligibility. The Institute's staff members made different credibility determinations than the Committee did, and thus, came to a different conclusion about Student-Athlete 1's eligibility. This conduct is the result of a difference of opinion based on the facts available at the time and does not rise to the level of this very serious finding. Indeed, Georgia Tech believes that had it declared Student-Athlete 1 ineligible and sought reinstatement, based on the amount of benefit involved and lack of culpability, Student-Athlete 1 would have been reinstated without missing any competition or, at most, been withheld one game. Chairman Dennis Thomas stated at the press conference announcing the Committee's decision that the underlying violation involving Student-Athlete 1 "could have been secondary." NCAA Conf Call, July 14, 2011, p. 18. Georgia Tech gained no competitive advantage by not declaring Student-Athlete 1 ineligible when, had it done so, Student-Athlete 1 likely would have been reinstated before the vacated win at issue on this appeal. This fact demonstrates that Georgia Tech held a good faith belief at the time that no violations had occurred.

In addition to other penalties, the Committee ordered Georgia Tech to vacate the victory in which the ineligible player, Student-Athlete 1, participated. Georgia Tech won just one game in which Student-Athlete 1 participated while his eligibility was in question – the Atlantic Coast

² This case does not involve a finding of benefits provided by an agent or runner in violation of Bylaw 12.3.1.2.

Conference Championship Game. The Committee abused its discretion by imposing this penalty. The Appeals Committee has previously identified factors to be considered in determining whether to vacate victories, and vacation is not appropriate in this case. As stated above, had Georgia Tech declared Student-Athlete 1 and sought reinstatement, it is likely Student-Athlete would have been allowed to compete in the conference championship game. The vacation penalty punishes an entire team of student-athletes by taking away a championship because of decisions made in good faith by institutional staff members. The Committee imposed additional sanctions that more than adequately address the mistakes made.

Finally, in Finding B-2, Failure to Cooperate, the Committee found that Georgia Tech failed to cooperate when the Athletic Director told the Head Coach about the issues and subjects the Enforcement Staff intended to question a second student-athlete, Student-Athlete 2. The Head Coach then discussed this information with Student-Athlete 2. While the finding is factually correct, the conduct in this case does not rise to the level of the severe finding of failure to cooperate. Georgia Tech also notes that the Committee did not find that Student-Athlete 2 received impermissible benefits, and thus, did not find that Student-Athlete 2 competed while ineligible.

The Committee also did not find Student-Athlete 2 guilty of unethical conduct under Bylaw 10.1 for failure to provide truthful and complete information during the investigation.³ Any attempt to justify the Committee's finding of failure to cooperate by claiming that Georgia Tech's discussions with Student-Athlete 2 prior to his NCAA interview somehow enabled Student-Athlete 2 to lie in that interview about his own conduct is misguided, as it is both

³ This allegation was dropped by the Enforcement Staff prior to the hearing; however, as stated in the hearing instructions, the Committee had the authority to make additional findings or amend the allegations to conform with the information presented. The Committee did not do so in this case.

inconsistent with the findings the Committee made regarding Student-Athlete 2 and entirely speculative. The Committee may not specifically find no violation against Student-Athlete 2, and at the same time also find that Georgia Tech's actions caused Student-Athlete 2 to lie in his interview to avoid such a finding.

Contrary to the ominous language and implications in the Committee's Report, such as "Georgia Tech failed to cooperate in an apparent effort to avoid potential allegations of rules violations," the evidence at the hearing shows that there was no conspiracy to frustrate or impede the investigation. Indeed, the Enforcement Staff did not even allege this. The evidence showed that while Student-Athlete 2 was told of the topic of the investigation, the only "instructions" Georgia Tech provided Student-Athlete 2 prior to his NCAA interview were simply to tell the truth. While Georgia Tech made mistakes, the mistakes were at worst errors in judgment and evidence of a lack of familiarity with NCAA investigative process, not a designed plan to frustrate or obstruct any investigation.

III. The Committee's Finding of Violation B-3 (Failure to Meet the Conditions and Obligations of Membership) is Contrary to the Evidence and Based Upon Facts that Do Not Constitute a Violation.

The Committee found Georgia Tech guilty of failure to meet the conditions and obligations of membership by not withholding Student-Athlete 1 from competition. The Committee's findings are clearly contrary to the evidence presented at the hearing, and the facts found by the Committee do not constitute a violation of the Association's rules.

The appeal of a finding is reviewed on the following standard:

In reviewing the report in this case, the Infractions Appeals Committee may overturn a determination of fact or finding of violation by the Committee on Infractions only if:

- a. The committee's finding clearly is contrary to the evidence presented to the committee;
- b. The facts found by the committee do not constitute a violation of the Association's rules; or
- c. A procedural error affected the reliability of the information that was used to support the committee's finding. [Bylaw 32.10.2]

Elaborating on part (a) of the above standard, we have stated:

"A showing that there was some information that might have supported a contrary result will not be sufficient to warrant setting aside a finding nor will a showing that such information might have outweighed the information on which the committee based a finding. The Infractions Appeals Committee . . . will set aside a finding only on a showing that information might have supported a contrary result clearly outweighed the information on which the Committee on Infractions based the finding. The Committee on Infractions determines the credibility of the evidence." [University of Mississippi, Public Infractions Appeals Committee Report, page 8, May 1, 1995.]

University of Georgia Infractions Appeals Committee Report, June 3, 2005, pp. 27-28.

Under this standard, the information supporting a contrary result clearly outweighed the information upon which the Committee based its findings, and the facts as shown do not constitute a violation of NCAA rules. As such, the finding of failure to meet the conditions and obligations of membership should be overturned.

Contrary to the Committee's findings, Georgia Tech's decision to not withhold Student-Athlete 1 was based on a good faith belief regarding the information available at the time. While the Committee ultimately determined over a year later that Student-Athlete 1 should have been withheld, when viewed under a "real time" prism, Georgia Tech's decision was reasonable and certainly did not rise to the level of a failure to meet the conditions and obligations of NCAA membership.

The Committee stated that “[i]t appeared to the committee that the institution attempted to manipulate the information surrounding potential violations involving student-athlete 1 so there would be enough doubt about its validity to justify the decision not to declare him eligible.” COI Report, p. 12. Georgia Tech denies this vehemently and reiterates that it acted in good faith. A review of the Committee’s bases for the failure to meet the conditions and obligations of membership finding demonstrates this good faith.

Georgia Tech acknowledges that the Enforcement Staff sent two e-mails stating that there were questions about Student-Athlete 1’s eligibility. The e-mails demonstrate the Staff did not tell Georgia Tech that Student-Athlete 1 was ineligible or that it believed he was ineligible. The institution, not the Enforcement Staff, is responsible for deciding when a student-athlete has compromised his or her eligibility. The Committee determined that Georgia Tech’s decision not to withhold Student-Athlete 1 ultimately proved to be incorrect, but the fact that an institution makes an incorrect decision, or that the Enforcement Staff might disagree with an institution’s decision, does not constitute a failure to meet the conditions and obligations of NCAA membership. Based on the evidence known at the time, Georgia Tech concluded, in good faith, that Student-Athlete 1 should be allowed to compete.

Contrary to the Committee’s decision, Student-Athlete 1’s first interview was far from a clear recitation of what had occurred. The interview was full of confusing use of pronouns and speculation about who provided what to whom and why. For example, in his first interview with the Enforcement Staff, Student-Athlete 1 gave the following response about who gave him the clothes:

MW: Who gave them to you?

[Student-Athlete 1]: My cousin ‘cause he got a roommate named [the roommate] and he, I think, I don’t know if he worked at the Adidas place or not but I know he the one that gave them to us. He

the one that, um, said, he was, like, my friend got y'all an early Christmas present, and he was talking about [the roommate].

Student-Athlete 1 was interviewed a second time, by the Institute's former general counsel. In the second interview, Student-Athlete 1 clearly stated that his cousin provided the clothes. Based on this information, and advice of the former general counsel, Georgia Tech did not withhold Student-Athlete 1 because it did not believe a violation occurred if a relative provided the clothes.

In its Report, the Committee relies heavily upon the e-mail the Compliance Director sent to the ACC prior to Student-Athlete 1's second interview seeking guidance on whether a violation had occurred. In the e-mail, the Compliance Director reported that Student-Athlete 1 had a preexisting relationship with his cousin and his cousin's roommate;⁴ that it was common for Student-Athlete 1 and his cousin to exchange clothes; and that the roommate had provided \$312 in clothes to Student-Athlete 1.⁵ Based on these facts, the ACC said that it appeared no violation had occurred.

The Committee lists certain "facts" it says the Compliance Director should have provided to the ACC when seeking guidance on whether there was a violation as evidence supporting its finding. The Committee places undue emphasis, however, on some of these facts

⁴ The Committee, and the Enforcement Staff, take issue with the statement that Student-Athlete 1 had an established relationship with the roommate because Student-Athlete 1 did not know the roommate's last name. That is not as unusual as the Committee and Staff make it seem, certainly not in today's society.

⁵ The e-mail focused on the relationship between Student-Athlete 1 and the roommate because Student-Athlete 1's testimony in the first interview was not entirely clear regarding the source of the clothing. Georgia Tech compliance believed it permissible for a relative (i.e., the cousin) to provide the clothing but thought it not as clear with regard to the roommate. The institution's staff members later concluded that Student-Athlete 1's cousin, not the roommate, provided the clothes.

and also omits references to other information that casts doubt on whether these “facts” were relevant or even true.

The Committee found Georgia Tech should have informed the ACC that both Student-Athlete 1 and Student-Athlete 2 were invited by Student-Athlete 1’s cousin to get clothes. There is no evidence that Student-Athlete 2 was invited. The evidence is that the cousin sent a text message to Student-Athlete 1 inviting him to come to the cousin’s apartment. The text was sent to Student-Athlete 1 only, and it was reasonable for Georgia Tech to believe that Student-Athlete 2 simply tagged along. Hearing Transcript, pp. 103-104. Georgia Tech also notes that the Committee ultimately found that Student-Athlete 2 did not receive clothes.

The Committee also found that the Compliance Director should have told the ACC that it had banned an agency employee (“agency employee”) from the Georgia Tech weight training facilities and weight room. Georgia Tech had information indicating that the clothing came from Student-Athlete 1’s cousin or the cousin’s roommate. At the time the decision was made, there was no information suggesting the clothes came from the agency employee. The Committee’s statement regarding the agency employee overlooks its own finding that Student-Athlete 1 received the benefits from the roommate (not the agency employee) in violation of Bylaw 12.1.2.1.6 (preferential treatment), not Bylaw 12.3.1.2 (agents). At the time, Georgia Tech believed the information was not necessary to determine Student-Athlete 1’s eligibility, and thus, did not send the information to the ACC. The Committee’s findings that the agency employee did not provide the clothing and the violations triggered only preferential treatment legislation seem to confirm that Georgia Tech’s belief in November 2009 was in fact correct. Georgia Tech viewed the question in November 2009 as one involving possible preferential treatment, not

whether the agency employee was a runner for an agent. The Committee reached the same conclusion in 2011.

The Committee also states that Georgia Tech should have told the ACC that Student-Athlete 1 had speculated that the clothing was actually provided by the roommate to influence his decision with regard to an agent. A review of his testimony shows just how weak the speculation was:

MW: Why, umm, why did [the roommate] want to give this to ya'll? Why did, I mean, why is he giving ya'll an early Christmas present?

[SA1]: I don't. I, I really don't know.

MW: What's, help me understand.

[SA1]: Maybe, I don't. I really don't know.

MW: Who did—

[SA1]: I, I don't even how if [the roommate], like, actually knows the agent []. I don't even know if he know him, but, um. I know since [agency employee] and [the roommate] was homeboys since when they were, when they were, I mean, whenever. I would guess he get us some stuff to maybe going away or looking towards Book and them if we wanting to sign to an agent I guess.

MW: Help, help me understand that a little bit more.

[SA1]: Okay.

MW: Why, why would [the roommate] want you to go [agency employee's] way for an agent? You think [the roommate's] working for [agency employee] or [the roommate's] working for, for the agent?

[SA1]: I mean, I really don't know, I don't know what's going on. I just know we went to his house and, and we got it from [the roommate's] house.

This is a far cry from a definitive statement of receiving benefits from an agent.

Indeed, Student-Athlete 1's speculated on other matters, too, and turned out to be incorrect. Student-Athlete 1 speculated that his cousin might have received the clothes from the roommate because the roommate might have worked for Adidas. The roommate did not work for Adidas. Hearing Transcript, p. 101. Thus, Student-Athlete 1's speculation was not a "fact."

The bottom line is the Enforcement Staff and the Committee simply made different factual and credibility determinations than the Institute's general counsel and compliance staff did at the time. Georgia Tech acted in good faith. The Committee's finding that Georgia Tech failed to meet the conditions and obligations of NCAA membership presumes reckless or intentional disregard of the facts. The Committee's presumption is simply not true.

Based on the information actually known to Georgia Tech, and the credibility determinations it made, Georgia Tech acted in good faith and reasonably when it decided not to withhold Student-Athlete 1 from competition. The fact that Georgia Tech now acknowledges in retrospect it would make a different decision today (to declare Student-Athlete 1 ineligible and seek reinstatement) does not amount to a failure to meet the conditions and obligations of NCAA membership.

Indeed, the very fact that Georgia Tech did not declare Student-Athlete 1 ineligible shows that Georgia Tech had a good faith belief that there was no violation. Student-Athlete 1 received \$312 in clothes and shoes, and he returned all of the clothing unused. He retained only a pair of shoes valued at \$45. The attached case precedent demonstrates that in the past, Student-Athlete Reinstatement has not required withholding as a condition of reinstatement in preferential treatment cases involving similar amounts, or only imposed a one game withholding requirement. *See* SA Reinstatement Case ID 36609 (Sept. 3, 2010) (SA reinstated without any withholding after receiving \$375 in benefits from a fitness center as a result of his relationship

with former roommate and his family); SA Reinstatement Case 36701 (Sept. 17, 2010) (one game withholding required for \$568.94 in extra benefits). Had Georgia Tech declared Student-Athlete 1 ineligible, he certainly might have played in his three remaining games. Even if Student-Athlete 1 had been withheld for one game, the loss against Georgia, it is much more likely that he would have been reinstated prior to the next game, the ACC Championship game.

The genuine dispute of the underlying facts and the likelihood of reinstatement without withholding distinguish this case from those in the past the Committee found a failure to meet the conditions and obligations of membership. *See, e.g.*, Texas A&M – Corpus Christi Public Infractions Report, March 29, 2009 (undisputed evidence that institution was aware that student-athlete had actually received improper benefits, but failed to withhold student-athlete); Eastern Washington University Public Infractions Report, Feb. 11, 2009 (institution was aware of violations and that student-athlete should be withheld, but did not declare him ineligible until several days after competition).

The facts simply do not show that Georgia Tech failed to meet the conditions and obligations of membership when it decided not to withhold Student-Athlete 1 based on the facts it knew. Georgia Tech, therefore, requests that the finding of violation B-3 be reversed.

IV. The Penalty of Vacation of Wins Should Be Overturned Because it is Excessive and an Abuse of Discretion.

In addition to other serious penalties, including a \$100,000 fine and four years of probation, the Committee required Georgia Tech to vacate all victories in which Student-Athlete 1 competed while ineligible. Student-Athlete 1 played in three games while ineligible, and Georgia Tech won the second game (the ACC Championship Game) and lost the other two. Georgia Tech has been required to vacate the ACC Championship victory.

The Appeals Committee may set aside or reduce a sanction where it determines the Committee abused its discretion. Abuse of discretion exists in the following circumstances:

“...we conclude that an abuse of discretion in the imposition of a penalty occurs if the penalty: (1) was not based on a correct legal standard or was based on a misapprehension of the underlying substantive legal principles; (2) was based on a clearly erroneous factual finding; (3) failed to consider and weigh material factors; (4) was based on a clear error of judgment, such that the imposition was arbitrary, capricious, or irrational; or (5) was based in significant part on one or more irrelevant or improper factors.”

Alabama State University Infractions Appeals Committee Report, June 30, 2009, p. 23.

Under this standard, the imposition of this penalty is an abuse of discretion and should be reversed.

Vacation of a victory is not an automatic penalty where a student-athlete competes while ineligible. The Committee and the Appeals Committee have identified a list of factors to look at in determining whether vacation is appropriate:

That policy, developed with guidance from decisions on the Infractions Appeals Committee, states that while the committee retains discretion to apply (or not apply) the vacation penalty under any circumstances it believes to be appropriate, the likelihood of such a penalty is significantly increased when *any* of the following aggravating factors are present: academic fraud; serious intentional violations; direct involvement of a coach or high-ranking school administrator; a large number of violations; competition while academically ineligible; ineligible competition in a case that includes a finding of failure to monitor or a lack of institutional control; or when vacation of a similar penalty would be imposed if the underlying violations were secondary.

Southeast Missouri State University Public Infractions Report, June 18, 2008, pp. 10-11 (emphasis in original).

Here, the Committee vacated the win because “the institution should have withheld student-athlete 1 from competition until such time as his eligibility status could be resolved.”

COI Report, p. 19. A review of these factors shows that none is present in this case, and thus, vacation is not an appropriate penalty.

1. Academic Fraud: There is no allegation of academic fraud.
2. Serious Intentional Violations: As previously shown, Student-Athlete 1 did not knowingly take clothes in violation of NCAA legislation. Further, any violations by the institutional staff members in not withholding Student-Athlete 1 were mistakes in judgment, not intentional violations.
3. Direct Involvement of a Coach or High-Ranking School Administrator: No coaches or administrators were involved in the provision of benefits to Student-Athlete 1. Although institutional staff members were involved in the decision to not withhold Student-Athlete 1, they acted in good faith and did not intentionally violate any rule.
4. A Large Number of Violations: There were not a large number of violations. Rather, there was only one violation rendering one student-athlete ineligible.
5. Competition While Academically Ineligible: No one competed while academically ineligible.
6. Ineligible Competition in a case that Includes a Finding of Failure to Monitor or Lack of Institutional Control: There was no finding of failure to monitor or lack of institutional control.
7. When Vacation or a Similar Penalty Would Be Imposed if the Underlying Violations Were Secondary: Student-Athlete 1 would likely have been reinstated prior to the contest at issue. Under NCAA case precedent, preferential treatment violations generally do not result in vacation of wins unless there is a showing the institution was involved in the underlying violation or knowingly allowed the student-athlete to compete while ineligible.

Thus, a review of the relevant factors does not support the vacation penalty.

Moreover, vacation of a win in this case does not serve the underlying purpose of the sanction. Vacation of wins is intended to remove any competitive advantage gained where an ineligible student-athlete competed. Georgia Tech gained no such competitive advantage here, as had it declared Student-Athlete 1 ineligible, his eligibility would likely have been reinstated before the ACC Championship Game.

Most importantly, the vacation penalty here punishes the wrong people. Student-Athlete 1 competed while ineligible because Georgia Tech staff members reviewed the available information and decided that declaring Student-Athlete 1 ineligible was not warranted. They relayed this recommendation to President Peterson, who then decided not to withhold Student-Athlete 1. To the extent mistakes occurred in reaching this conclusion, the student-athletes who won the ACC championship did not make these mistakes and should not be punished for them in this manner. Georgia Tech has been punished significantly in other ways for these events and requests the Appeals Committee to set aside the vacation sanction.

V. The Committee's Finding of Violation B-2 (Failure to Cooperate) is Contrary to the Evidence and Based Upon Facts that Do Not Constitute a Violation.

Separate and apart from the issues arising from the eligibility of Student-Athlete 1, Georgia Tech appeals from the finding of failure to cooperate.⁶ Georgia Tech is well aware that cooperation is one of the bedrock principles in the NCAA enforcement process. Georgia Tech appreciates the importance of this principle, and that is why it takes the Committee's failure to cooperate finding so seriously. Georgia Tech recognizes that it should have handled matters differently, but the failure to cooperate finding is not justified. The Committee's findings in this regard are clearly contrary to the evidence presented at the hearing, and the facts found by the Committee do not constitute a failure to cooperate.

Georgia Tech admits that institutional staff members discussed with Student-Athlete 2 the fact that he would be interviewed, the general subject matter of the interview, and the interview process. The Committee on Infractions Report, however, goes too far in accusing the

⁶ The Committee stated that the issues involving Student-Athlete 2 played no role in the decision to impose the sanction of vacation of wins. Committee's Report, p. 19. Thus, the failure to cooperate finding is separate from the issues raised in Sections III and IV above.

Institute's representatives in the interviews of having a "combative" and "confrontational" attitude. COI Report, p. 7. While Georgia Tech regrets that the Enforcement Staff felt that way, the Staff did not notify Georgia Tech's President of these concerns at that time so he could address any issues as needed. If the Enforcement Staff believed Georgia Tech's staff members were not cooperating with an investigation, were impeding an investigation, or even acting rudely, it should have notified Georgia Tech's President immediately. Georgia Tech leadership was not given the opportunity to address the issue and demonstrate its commitment to cooperation.

As for the actual finding of lack of cooperation based on the pre-interview discussions with Student-Athlete 2, the discussions reflected, at worst, errors in judgment and lack of experience with the NCAA investigative process. The Enforcement Staff did not allege any sort of conspiracy on the part of anyone at Georgia Tech. Instead, the Enforcement Staff alleged that Georgia Tech did not follow its instructions that any discussion of the subject matter of the inquiry should be limited to the Compliance Director, President and Athletics Director:

Mr. Najjar: If I could just briefly circle back to Mr. Banowsky's earlier question. We are not alleging a conspiracy. If we were, you would probably see more than on unethical conduct violation being alleged.

It is just simply that we laid out some very clear and strict parameters, and the institution did not adhere to those.

Hearing Transcript, p. 182.

The evidence at the hearing confirms that there was no plan to undermine the investigation and the cooperative principle. While the Institute regrets these Enforcement Staff's instructions were not followed, this failure resulted from innocent mistakes and not a motive to undermine the investigation. The Athletics Director made the decision to share the information with the Head Coach because he felt that telling the Head Coach was necessary to protect their

working relationship. The Athletics Director knew the Head Coach would soon learn of the investigation and interviews and was concerned that, if the Head Coach learned from some third party, it would undermine their working relationship. There was no intent to undermine any cooperation. The Athletics Director determined that, based on his past experience and relationship with the Head Coach, it was the right thing to do.

In addition, and as the Athletics Director explained at the hearing, he shared the information with the Head Coach because the Enforcement Staff allowed him to have such a discussion in a prior matter. The Enforcement Staff at the hearing explained that the reason the free flow of information was allowed in the prior matter was because of the institution's early involvement in the investigation and that "it then became kind of a collaborative effort." Hearing Transcript, p. 197. Even though the Athletics Director turned out to be incorrect, it was reasonable for him to believe that this investigation, like the prior one, would also be a collaborative effort.

Likewise, the Head Coach asking Student-Athlete 2 about the matters to be discussed did not indicate any intent to violate the cooperative principle. The Head Coach was not told to not discuss the matter with Student-Athlete 2. Hearing Transcript, pp.174-175.

Further, the fact that the Compliance Director asked Student-Athlete 2 about these matters was not evidence of a failure to cooperate. As shown, Student-Athlete 2 was already aware of the subject matter through his discussion with the Head Coach.

The Enforcement Staff acknowledged that this serious charge is not brought "every time we think that somebody goes and tells another person." Hearing Transcript, p. 186. Rather, it stated that it only brings this charge when it believes that harm occurred. Hearing Transcript, p.

186. The record here, contrary to the Committee on Infractions' findings, shows no evidence of harm.

The Committee's findings are the most compelling proof that no harm occurred. As noted above, the Committee did not find Student-Athlete 2 guilty of unethical conduct for failing to provide truthful information in his NCAA interview, nor did it find that he violated any NCAA bylaws or competed while ineligible. Any argument by the Committee that the failure to cooperate somehow compromised the Enforcement Staff's investigation is based entirely upon the erroneous assumption that Student-Athlete 2 lied in his interview and was able to cover his tracks by virtue of receiving advance notice. The Enforcement Staff dismissed the unethical conduct charge against Student-Athlete 2 prior to the hearing. The only finding the Committee made regarding Student-Athlete 2 is that he did not receive impermissible benefits.

As a factual matter, there is no evidence demonstrating any harm to the investigation. The Enforcement Staff argued that there was harm because Student-Athlete 2 denied everything at his interviews, an argument based entirely upon the premise that Student-Athlete 2 lied in his NCAA interview.⁷ Hearing Transcript, pp. 187-188. Even if Student-Athlete 2 lied, and Georgia Tech does not believe he did, there is no basis to conclude that Student-Athlete 2's denials were influenced by anything Georgia Tech did prior to the NCAA's interview. The evidence shows that Student-Athlete 2 gave the same answers to the questions when asked by the Head Coach, the Compliance Director, and, finally, by the Enforcement Staff. Hearing

⁷ This argument is hard to comprehend in light of the Enforcement Staff's decision not to pursue any unethical conduct charge against Student-Athlete 2. Similarly, the Committee had the discretion to charge Student-Athlete 2 with unethical conduct based upon the information presented at the hearing but chose not to do so. To the extent the Committee's finding is based upon the argument, the Committee clearly erred.

Transcript, p. 157, 162. Simply put, there is no evidence of any actual harm, and the Committee erred when it simply presumed it.

There is one final fact not mentioned in the Committee on Infractions' report which shows conclusively that there was no failure to cooperate: the only instructions ever given to Student-Athlete 2 about his answers in his interview with the Enforcement Staff were to tell the truth. The Athletics Director explained this at the hearing:

No less than a half a dozen times was [Student-Athlete 2] told individually by people around in that room, "[Student-Athlete 2], just relax. Tell the truth and answer the investigator's questions." That was really the essence of the meeting. It was not very long.

Hearing Transcript, p. 173.

The same thing occurred in the Head Coach's initial conversation with Student-Athlete 2; he told Student-Athlete 2 to tell the truth:

So, after the game on Saturday, I pulled [Student-Athlete 2] aside the bus before we left Duke. I said, "[Student-Athlete 2], the NCAA is going to come to talk to you Monday." And he goes, "About what, Coach?" I said, "About taking a cell phone or by hanging out with [agency employee]." I didn't know [agents] existed.

He goes, "Coach, I didn't do anything, I didn't take anything." I said, "Well, just tell the truth and you will be fine." I said "Go in there and tell the truth."

* * *

So, he came over to the office and as Dan said, it was about a five-minute meeting. I don't think I even opened my mouth. [Compliance Director] asked him some questions, and everybody told him, "[Student-Athlete 2], go tell the truth and you will be all right," because he was animate [sic] that he had not done anything.

Hearing Transcript, pp. 174-175.

There were no other meetings with the Student-Athletes about these interviews. Hearing Transcript, p. 177.

Georgia Tech asks the Appeals Committee to compare this case with prior cases where a failure to cooperate was found. There is no instance here of a person refusing to be interviewed. See, e.g., Florida State University Public Infractions Report, March 6, 2009; Savannah State University Public Infractions Report, May 19, 2006. And there is no instance here of an institution encouraging a person to lie or otherwise mislead in the interviews. See., e.g., University of Tennessee, Knoxville Public Infractions Report, August 24, 2011.

This case is also different from a recent case where someone at an institution informed people of the subject matter of an investigation prior to the interviews with the Enforcement Staff. In University of Tennessee-Chattanooga Public Infractions Report, September 23, 2010, the compliance director informed the head men's basketball coach that an audit had revealed that the former director of men's basketball operations placed impermissible phone calls to a prospective student-athlete. Contrary to the instructions the compliance director gave him, the head coach then asked the former director of operations, and later the student-athlete, about the phone calls. The student-athlete admitted receiving the calls.

Several months later, the Enforcement Staff asked to interview the student-athlete about the calls. When the head coach notified the student-athlete that he was going to be interviewed, he told the student-athlete of the subject matter of the interview to allay the student-athlete's concerns. At his interview, the student-athlete lied about the calls. The student-athlete later requested a second interview, where he corrected his earlier false testimony.

The Committee found that the head coach had failed to protect the integrity of the investigations by speaking with the former director of operations about the calls, speaking with the student-athlete about the calls, and telling the student-athlete that he would be interviewed about the calls. Significantly, the Committee stated that "[i]t appeared that, had the head men's

basketball coach not discussed the impermissible calls with the young man, it would have been more likely that the young man would have been truthful.” Tennessee-Chattanooga, p. 14.

Conversely, in this case, Student-Athlete 2 gave the same answers to both the Georgia Tech Head Coach and the Enforcement Staff. There is no indication that telling the student-athlete impeded the investigation at all. There was no harm done to the investigation, and telling someone to tell the truth cannot be seen as impeding an investigation.

Given there was no intent to frustrate the investigation, no evidence it did frustrate the investigation, and the only “instruction” given was to tell the truth, Georgia Tech’s actions do not rise to the level of failure to cooperate. Georgia Tech respectfully requests the finding of failure to cooperate be set aside.

VI. Conclusion.

Georgia Tech cannot overstate its respect for the core principles of the NCAA and its enforcement procedures. Georgia Tech is aware of, and committed to, its duty to cooperate, and is aware of the conditions and obligations of membership when it comes to withholding ineligible athletes from competition. Georgia Tech regrets that it made mistakes during this investigation but disagrees that the mistakes warrant the Committee’s serious findings and penalties.

No member institution is perfect, and the fact Georgia Tech staff members made mistakes does not turn their actions into major violations. The Committee’s substantial excessive penalties and harsh language in its Report are simply not justified in light of the evidence presented. The findings of failure to cooperate and failure to meet the conditions and obligations of membership should be vacated.

Likewise, the penalty of vacation of Georgia Tech's only victory at issue, the ACC Championship, should be reversed. This penalty punishes the wrong people, and is an abuse of discretion.

Exhibit List for the Appeal of the Georgia Institute of Technology

1. Georgia Institute of Technology Public Infractions Report No. 345, July 14, 2011
2. University of Georgia Infractions Appeals Committee Report, June 3, 2005
3. Student-Athlete Reinstatement Case ID 36609, September 3, 2010
4. Student-Athlete Reinstatement Case 36701, September 17, 2010
5. Texas A&M – Corpus Christi Public Infractions Report, March 29, 2009
6. Eastern Washington University Committee on Infractions Report, February 11, 2009
7. Alabama State University Infractions Appeals Committee Report, June 30, 2009
8. Southeast Missouri State University Public Infractions Report, June 18, 2008
9. Florida State University Public Infractions Report, March 6, 2009
10. Savannah State University Public Infractions Report, May 19, 2006
11. University of Tennessee - Knoxville Public Infractions Report, August 24, 2011
12. University of Tennessee-Chattanooga Public Infractions Report, September 23, 2010